United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

YTZHAK HAREL,

Plaintiff-Appellee,

against

HARRY DIAMOND,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT

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POINT I

The plaintiff-respondent's cases are not in point.

The instant brief is served in reply to the brief submitted on behalf of the Defendant-Appellant.

In relation to the brief submitted by Harel, the defendant-appellant respectfully refers the Court to their brief heretofore served. The instant brief is primarily directed to the argument set forth on behalf of the respondent. These arguments urge that the verdict for plaintiff-re-

spondent was fully supported and that the Trial Court committed no error.

Point I of the Defendant-Appellant's Main Brief cites error in that the Court charge diminished earning capacity wherein the plaintiff, by his own admission, made no claim for this relief. A verdict of $75,000 was rendered on the basis of that charge as a whole. Not only was this verdict excessive as to pain and suffering, but it includes an amount for an element of damage, diminished earning capacity, which was neither pleaded nor proved. The case in point is *Pickett* v. *Town of West Monroe,* cited at page 15 of the defendant-appellant's main brief. The court in *Pickett* held that in the absence of any allegation or proof as to loss of earning capacity due to personal injury, the plaintiff is entitled to nominal damages only. Justice McLennan in his concurring opinion stated that "The rule is well-settled that unless proof is made as to the value of the services of a person injured through the negligence of another, or some evidence given from which it can be determined with reasonable certainty what such person would have earned, except for the injury, no damage can be recovered for loss of earning capacity." (page 32-33). This Court reiterated what was declared in *Wood* v. *City of Water Town,* 11 N.Y.S. 864, wherein that Court said "Before damages for future pecuniary loss can be awarded there should be some proof such as a party can always give of his circumstances and condition in life and his earning power, skill and capacity."

There was no evidence in the instant case tending to show what the plaintiff was capable of earning, or what he could have earned now or in the future, except for the injuries he had sustained. The plaintiff never pleaded loss of earning capacity and did not seek to give any proof of same. In the case of tort damages generally, damages for impairment of earning capacity cannot be recovered

in a personal injury action where there is no evidence of such impairment or no evidence from which damages therefore can be calculated. 18 A.L.R. 3rd 97.

The cases cited by the plaintiff-respondent are not in point. Although the court allowed an assessment of damages in the Grayson case, *Grayson* v. *Irvmar Realty Corp.*, 7 A.D.2d 436 184 N.Y.S.2d 33, it did so on an objective basis with the claim having been pleaded and proved. The court had taken the testimony of an operatic coach and a voice teacher. The jury had this type of proof to consider when they had to assess the potential worth of a budding operatic career.

The court said:

> "In determining, therefore, the amount to be recovered, the jury may consider the gifts attributed to plaintiff; the training she has received; the training she is likely to receive; the opportunities and the recognition she already has had; the opportunities she is likely to have in the future; the fact that even though the opportunities may be many, that the full realization of those opportunities is limited to the very few; the fact that there are many other risks and contingencies, other than accident, which may divert a would-be artist from her career; and, finally, that it is assessing directly not so much future earning capacity as the opportunities for a practical chance at such future earning capacity."

There was testimony in this case to the effect that this young operatic singer was readying for a European debut. There was testimony as to her having had foreign language training which was a necessary part of an operatic career. There was further testimony to the effect that she was accomplished in the playing of several instruments. In short, there was direct proof as to her potential earn-

ing capacity. The Court noted that a jury must discount every gleam in a doting parent's eye and every self-delusion as to one's potentialities. It stated that a jury is not to assess within the limits of wishful thinking but is to assess the genuine potentialities, although not yet realized, as evidenced by objective circumstances. With this in mind, the Court found the jury award excessive, reversed on the facts and granted a new trial on the issue of damages. It is interesting to note that the injuries claimed in that case involved impairment of hearing.

In the case of *Kaffana* v. *Pennsylvania Railroad Co.*, 217 F. Supp. 362 cited by the plaintiff, *Kaffana's* increased earnings lasted only 6 months. There was testimony by the plaintiff regarding what efforts he had made to find employment after his knee injury. He testified as to instances where he was rejected for employment because of his knee condition. He testified that after the initial six months period his earnings were negligible because of his inability to obtain steady employment. There was testimony as to what his past earnings had been so that a jury could reasonably fix future loss. In the instant case, although there was testimony as to the plaintiff Harel, being an airplane mechanic, no attempt was made to introduce evidence as to earnings in this field. The court, in *Kaffana*, said that it was the jury's province to determine the loss of earning power *within limits reasonably fixed by the evidence* (Emphasis Ours).

In *Faudree* v. *Iron City Sand & Gravel Co.*, 315 F.2d 647 cited by plaintiff, *Faudree* testified to similar efforts made to secure other employment wherein at least once his application for employment was refused because of his condition. There was testimony that the plaintiff was totally permanently disabled from performing his former duties as chief engineer on a diesel vessel of the type on which he worked prior to this accident. There was also

testimony that he was 30 to 50 percent disabled from *general employment*. Here, as with the other cases, there was testimony as to what he has earned in his chosen profession.

In *Wiles* v. *New York, Chicago & St. Louis Railroad Co.,* 283 F.2d 328 there was objective evidence to the effect that *Wiles* with his present medical history would have difficulty under the conditions of modern industry in attaining gainful employment in his chosen field of heavy industry. There was testimony to the effect that the job that *Wiles* currently held would be his job in all liklihood for life.

There is a complete absence of evidence, in the instant case on which the jury could have intelligently assessed the monetary difference between what the plaintiff, Harel earned and what he would have been able to earn in the future, had he not been injured. The Trial Court erred in charging disminished earning capacity where there was a total lack of proof as to this issue.

POINT II

The review of the issue of excessiveness of an award, by the appellate court constitutes a proper exercise of its discretion.

The standard applicable to remittitur governed by the Federal Court was well articulated by the U.S. Court of Appeals Second Circuit in *West* v. *Jutras*, 456 F.2d 1224 (U.S. Ct. of Apps., 2nd Circuit 1972). The Court in *West* at page 1225 cited *Dagnello* v. *Long Island Railroad Co.*, 289 F.2d 797 U.S. (Court of Appeals 2nd Circuit 1961) and said:

"The standard for review of damage awards to determine whether they are excessive was articulated by this court in *Dagnello* as follows:

> If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsel restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."

This court went on to say:

> "This test has been implicitly approved by the Supreme Court in Grunenthal; that case further directs us to make a detailed appraisal of the evidence bearing on damages in applying the *Dagnello* test. We have made that detailed appraisal as indicated by our statement of the facts, and we conclude that the verdict of $55,000 is excessive."

It is within this Court's discretion to review the issue of excessiveness as presented in the instant case.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment against Appellant, Harry Diamond be set aside and a new trial on the issue of damages granted.

Respectfully submitted,

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Attorneys for Defendant-Appellant

Services of ~~these~~ two copies of
the within reply brief is
hereby admitted this 3 day
of March, 1977

Weinstein Charp & Band PC
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